Due service of the within brief is hereby acknowledged this.....day of January, A. D. 1933.

_____

_____

Attorneys for Respondent.

FILE COPY

Office Supreme Court, U. S.
FILED
DEC 17 1932
CHARLES ELMORE CROPLEY
CLERK

No. 518

In the Supreme Court of the United States

OCTOBER TERM, 1932

PACIFIC COAST STEEL COMPANY, A CORPORATION, PETITIONER

v.

JOHN P. MCLAUGHLIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST COLLECTION DISTRICT OF CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
Argument	4
Conclusion	10
Appendix	11–13

CITATIONS

Cases:	
Aiken v. *Burnet*, 282 U. S. 277	4, 5
Baltimore & Ohio R. R. v. *United States*, 260 U. S. 565	7
Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346	5
Commissioner v. *Hind*, 52 F. (2d) 1075	7
Corn Products Refining Co., 22 B. T. A. 605	8
Florsheim Bros. Drygoods Co. v. *United States*, 280 U. S. 453	6
McDonnell v. *United States*, 59 F. (2d) 290, No. 330, October Term, 1932	9
Remington-Rand, Inc. v. *United States*, 57 F. (2d) 1069	6
Rock Island, Arkansas & Louisiana R. R. v. *United States*, 254 U. S. 141	7
Roy & Titcomb v. *United States*, 39 F. (2d) 753; 282 U. S. 811	5, 6
Russell v. *United States*, 278 U. S. 181	5, 9
Stange v. *United States*, 282 U. S. 270	4, 5, 8
Truda v. *United States*, No. 331, October Term, 1932	9
Tucker v. *Alexander*, 275 U. S. 228	8
Uncasville Mfg. Co. v. *Commissioner*, 55 F. (2d) 893, certiorari denied, 286 U. S. 545	9, 10
United States Refractories Corp., 23 B. T. A. 872	8
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269	7
Washington Coal & Coke Co. v. *Heiner*, 55 F. (2d) 229	5
W. P. Brown & Sons Lumber Co. v. *Burnet*, 282 U. S. 283	4, 5
Statutes:	
Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300—	
Sec. 277 (U. S. C., Title 26, Sec. 1057)	11
Sec. 278 (U. S. C., Title 26, Secs. 1060, 1062)	11
Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59—	
Sec. 277 (U. S. C. App., Title 26, Sec. 1057)	12
Sec. 278 (U. S. C. App., Title 26, Secs. 1060, 1061, 1062)	12

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 518

PACIFIC COAST STEEL COMPANY, A CORPORATION, petitioner

v.

JOHN P. McLAUGHLIN, UNITED STATES COLLECTOR of Internal Revenue for the First Collection District of California

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

No written opinion was rendered by the District Court. That court's findings of fact and conclusions of law are contained in the record, pages 37–40. The opinion of the Circuit Court of Appeals (R. 65–86) is reported in 61 F. (2d) 73.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 22, 1932. (R. 86–87.) The petition for certiorari was filed November 21, 1932. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether income and excess profits tax waivers, referring only to assessments, were effective to waive the statute of limitations as to the collection of taxes already assessed when the waivers were given.

2. Whether, if the period for collection was extended by waiver to December 31, 1927, the time for collection was limited to the period specified in the waiver, or whether, by virtue of Section 278 (d) of the Revenue Act of 1926, the collection could be made within six years after assessment.

3. Whether a waiver signed by the taxpayer but not signed by the Commissioner of Internal Revenue was valid.[1]

4. Whether a waiver given after the enactment of Section 278 (e) of the Revenue Act of 1924, as to taxes assessed before its enactment, extended the period for collection.

---

[1] We contend *infra* that this question should not be considered since it was not raised in the petitioner's claim for refund or in the District Court.

STATUTES INVOLVED

The applicable provisions of the statutes involved are set forth in the Appendix (*infra*, pp. 11–13).

STATEMENT

Petitioner brought this suit in the District Court for the Northern District of California to recover income and excess-profits taxes collected for the year 1917. The following is a summary of the findings of fact made by the court (R. 37–40):

Petitioner filed its income-tax return for 1917 on March 30, 1918, with the Collector of Internal Revenue for its district, and it paid the tax shown to be due on this return. On June 24, 1920, the Commissioner of Internal Revenue made a tentative determination of a deficiency for 1917 of $209,876.47. On December 9, 1922, the Commissioner determined that the proper deficiency due for this year was $257,443.30. On February 9, 1923, a deficiency in this amount was assessed against petitioner, and on April 1, 1923, a notice and demand for payment was made by the Commissioner. On December 16, 1922, the petitioner consented to a determination, assessment, and collection of the amount of income and excess-profits taxes against it for the years 1911 to 1917, inclusive, under the Revenue Act of 1921 or any prior Revenue Act, irrespective of any period of limitations. On December 7, 1925, the plaintiff agreed to waive the time prescribed by law for making any assessment of taxes for 1917, 1918,

1919, and 1920, this waiver to remain in effect until December 31, 1926. On November 19, 1926, this period was extended until December 31, 1927. No proceeding to collect any deficiency in taxes for 1917 was begun prior to December 7, 1925.

On July 16, 1927, the Commissioner gave petitioner a notice and demand in writing of a deficiency in taxes for 1917 of $129,200.06 remaining after the application of certain overpayments by petitioner of its taxes for 1918 and 1919 as credits upon the deficiency for 1917. On August 27, 1928, petitioner paid the balance of the deficiency claimed.

Petitioner on October 23, 1928, filed a claim for refund of its taxes for 1917 in the amount of $284,252.20, the grounds set forth in the claim for refund being made the basis of the instant suit. This claim was rejected December 14, 1928.

The District Court gave judgment for respondent. (R. 46–47.) The Circuit Court of Appeals affirmed this judgment. (R. 86–87.)

ARGUMENT

The principles applicable to the first two questions have been decided by this Court in favor of the respondent. Accordingly, we submit that there is no necessity for a review of the merits of these two questions.

As to the first question, in *Stange* v. *United States,* 282 U. S. 270; *Aiken* v. *Burnet,* 282 U. S. 277, and *W. P. Brown & Sons Lumber Co.* v. *Bur-*

net, 282 U. S. 283, this Court held that a waiver in terms mentioning only assessment of taxes also applied to collection. Although in those cases the deficiency had not been assessed at the time the waiver was given, while here an assessment had already been made, the same principles seem to apply to both situations. The waivers here were undoubtedly given to permit reconsideration of petitioner's tax liability. It may be noted that subsequently, on June 30, 1927, an abatement of $38,545.02 of the deficiency was allowed. (R. 7, 16.) The parties could not have intended to have the amount of the tax ascertained as a result of the waivers and then allow its collection to depend upon the petitioner's whim. Cf. *Stange* v. *United States, supra,* p. 277. The point was decided in favor of the United States in *Roy & Titcomb* v. *United States,* 39 F. (2d) 753 (C. Cls.), where the assessment had been made prior to the giving of the waiver. In affirming that decision (282 U. S. 811) this Court cited *inter alia* the *Stange, Aiken,* and *W. P. Brown & Sons Lumber Company cases, supra.* See also *Washington Coal & Coke Co.* v. *Heiner,* 55 F. (2d) 229 (C. C. A. 3d). Neither *Bowers* v. *New York & Albany Lighterage Co.,* 273 U. S. 346, nor *Russell* v. *United States,* 278 U. S. 181, cited by the petitioner was concerned with the effect of waivers.

As to the second question, the court below properly held that since the last waiver extended the

period for collection to December 31, 1927, within the effective date of the Revenue Act of 1926, the six-year period allowed for collection after assessment provided by Section 278 (d) of that Act (*infra*, p. 12) applied, and extended the time to February 9, 1929. Accordingly, the court below held that collection of a portion of the assessment by application of a credit on or about July 16, 1927, prior to the expiration of the last waiver and collection of the balance of the assessment on August 27, 1928, within the time limited by section 278 (d) of the 1926 Act was timely. The contention (on which petitioner relies) that collection was barred after December 31, 1927, the date of expiration of the last waiver, was rejected by this Court in *Florsheim Bros. Drygoods Co.* v. *United States*, 280 U. S. 453. It was there held that waivers were not binding contracts, limiting the time in which the Commissioner could assess and collect taxes, and that the six-year period for collection after assessment provided by the Revenue Act of 1926 applied, even though such period was contained in a statute enacted after the waivers were given. Neither *Roy & Titcomb* v. *United States*, *supra*, nor *Remington-Rand, Inc.*, v. *United States*, 57 F. (2d) 1069 (Del.), cited by the petitioner, is to the contrary, since in those cases it was held that collection was made within the period mentioned by the waiver and the courts found it unnecessary to determine whether the six-year period after assessment applied.

We submit that the contention, that the waiver of December 7, 1925, was invalid because not signed by the Commissioner, may not be urged as a ground for recovery because it was not presented in the petitioner's claim for refund nor set forth in its complaint. *Rock Island, Arkansas & Louisiana R. R.* v. *United States,* 254 U. S. 141; *Baltimore & Ohio R. R.* v. *United States,* 260 U. S. 565; *United States* v. *Felt & Tarrant Mfg. Co.,* 283 U. S. 269.

The claim for refund (R. 20–21) did not urge the contention that the waiver of December 7, 1925, was invalid because it had not been signed by the Commissioner. The claim specifically set forth the waivers, conceded that they were effective to extend the period for assessment, and urged as the only objection that they did not revive the Government's right to collect a tax already assessed. (R. 20.) The concession that the waiver was effective to extend the period for assessment is directly opposed to a contention that it was ineffective because not properly executed. The objection was not specifically raised in the complaint nor was the point discussed by the Circuit Court of Appeals. The contention was advanced for the first time in petitioner's brief in the court below and objection to its consideration was made in the Government's brief because the point was not raised in the claim for refund.[2]

[2] It has been held that a waiver is valid although not signed by the Commissioner or by any person on his behalf. *Commissioner* v. *Hind,* 52 F. (2d) 1075 (C. C. A. 9th).

Although the claim for refund did not raise the question whether a waiver, given after the effective date of the Revenue Act of 1924, is effective in view of Section 278 (e) of that Act to extend a period for collection which had expired prior to enactment of the Act,[3] the respondent did not object to its consideration in either court below. For this reason we do not urge that the fourth question should not be considered because the point was not raised in the claim for refund. It is possible that respondent's action in not raising the objection in the trial court or in the court below caused the petitioner to fail to take available steps to protect its rights and to preserve this question for review. Cf. *Tucker* v. *Alexander,* 275 U. S. 228. Whether or not it could have done so, we do not make the objection as to the question in this case.

We believe, however, that the fourth question does not merit review by this Court. The question is narrow in its scope, involving only the validity of waivers given during the effective period of the Revenue Act of 1924 to extend the period of collec-

---

Signature by the Commissioner is only necessary for administrative purposes. See *Stange* v. *United States*, *supra*, p. 276. The sole decisions to the contrary cited by the petitioner are those of the Board of Tax Appeals in *Corn Products Refining Co.*, 22 B. T. A. 605, and *United States Refractories Corp.*, 23 B. T. A. 872.

[3] The first waiver, executed on December 16, 1922, expired by departmental ruling on April 1, 1924. The Revenue Act of 1924 became effective June 2, 1924. The second waiver was executed by petitioner on December 7, 1925.

tion which had expired prior to the enactment of that Act. Petitioner urges as a reason for review that the decision of the court below upon this question is in conflict with the decision in *Uncasville Manufacturing Co.* v. *Commissioner,* 55 F. (2d) 893 (C. C. A. 2d), certiorari denied 286 U. S. 545.[4] We believe, however, that there is no conflict between the decisions. The *Uncasville case* involved the effect of Section 278 of the Revenue Act of 1924 upon waivers subsequently given to extend the period of assessment of a tax where no assessment had occurred before the enactment of the Act. Assessment in the instant case was made prior to the enactment of the Revenue Act of 1924. In *Russell* v. *United States,* 278 U. S. 181, this Court held that Section 278 of the Revenue Act of 1924 did not apply to assessments made prior to its effective date. Accordingly, it seems clear that whether or not the Revenue Act of 1924 had any effect upon assessments made after its enactment under waivers subsequently executed, it had no effect upon the waivers involved in the instant case or the collection of the tax here involved. As pointed out above (pp. 5, 6) the waivers executed by petitioner extended the period for collection to December 31, 1927, within the effective date of

[4] The question upon which certiorari was sought has no connection with the question here involved. The same question as to the validity of a waiver decided in the *Uncasville Manufacturing Co. case* is also involved in *McDonnell* v. *United States*, and *Truda* v. *United States*, now pending on certiorari, Nos. 330, 331, October Term, 1932.

the Revenue Act of 1926 and thus collection was timely because expressly authorized by Section 278 (d) of that Act. The decision of the court below pointed out the differences between Section 278 in the 1924 and the 1926 Acts and clearly distinguished the *Uncasville case* reaching, as we contend, the correct conclusion on this question, which is in accord with the principle of prior decisions by this Court. We believe that there is no conflict of decisions and that this question, like the others presented, should not be reviewed by this Court.

CONCLUSION

We submit that the decision of the court below was correct, and that such questions as have been properly presented are governed in principle by previous decisions of this Court. The petition should be denied.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
A. H. CONNER,
NORMAN D. KELLER,
Special Assistants to the Attorney General.
WILLIAM H. RILEY, Jr.,
Attorney.

DECEMBER, 1932.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C., Title 26, Sec. 1060.)

* * * * *

(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59:

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. (U. S. C. App., Title 26, Sec. 1061.)

(e) This section shall not bar a distraint or proceeding in court begun before the en-

actment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment, distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act. (U. S. C. App., Title 26, Sec. 1062.)

U. S. GOVERNMENT PRINTING OFFICE: 1933